In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1465

G.L. GIBBONS TRUCKING SERVICE, INC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decision and order (A. 1-54)[1] are reported at 199 NLRB No. 88.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-7a) was entered on January 21, 1974. The petition for a writ of certiorari was filed on April 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." references are to the separate appendix to the petition. "Tr." references are to the stenographic transcript of the hearing before the Trial Examiner.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company discharged employee LeRoy Mason because of his union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158), are set forth at p. 3 of the petition.

STATEMENT

The Board found that petitioner Company, which performs an ash hauling service for Southern California Edison Company violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation of, and lending assistance to, Ash Haulers, of Nevada, Inc. ("Ash Haulers"), a labor organization (A. 28-30). It also found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their activities on behalf of Local 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 631"), by threatening to discharge and refusing to reemploy its employees because of such activity, by promising to negotiate with Ash Haulers only if the employees withdrew support from Local 631, or persuaded Local 631 to withdraw the representation petition filed with the Board, and by threatening to withhold employment from its employees unless they persuaded Local 631 to withdraw the representation petition filed with the Board, and by threatening to withhold employment from its employees unless they persuaded Local 631 to effect such withdrawal (A. 30-34). Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate

employees LeRoy Mason (A. 34-39), Mark Vaughn (A. 39-40), Ronnie I. Jenkins, and Brian Fountain (A. 40-43) because they engaged in union or other concerted activities.

The Board ordered the Company to cease and desist from the unfair labor practices found, to disestablish Ash Haulers, to bargain upon request with Local 631, to offer the aforesaid employees reinstatement and back-pay, and to post appropriate notices (A. 3-5, 49-54). The court of appeals enforced the Board's order (Pet. App. 1a).

Petitioner here contests only the Board's finding that the discharge of LeRoy Mason was unlawful (Pet. 4). The facts relevant to that issue are as follows:

The Company's ash disposal operation at Southern California Edison's Plant in South Point, Nevada, utilizes two to four employees, who work in a limited area under the direct supervision of foreman William Strunk, son-in-law of Company President G.L. Gibbons (A. 3-4). The disposal operation consists of dumping ashes from hoppers close to Edison's boiler into a large "Euclid" dump truck, and hauling the ashes to canyons and open areas on the premises where they are then dumped from the truck, spread, and covered with dirt by a tractor. Ordinarily one man operates the hopper, another cleans up, a third drives the truck, and a fourth drives the tractor to spread the ashes (Tr. 7-9, 12-13).

Le Roy Mason was hired by Strunk in October 1971, as "cleanup man" (A.9). In early December, Mason expressed his dissatisfaction to fellow employees Fountain, Jenkins, and Vaughn, over the dilatory contract negotiations the Company was conducting with the

Ash Haulers.[2] The employees agreed that Mason should make contact with the steward of Teamsters Local 631, which represented Edison's employees, concerning possible Teamsters affiliation (A. 11-12; Tr. 193-194). Pursuant to Mason's request, Local 631's steward, whom Strunk knew (A. 12; Tr. 244), delivered membership application cards to Mason while he was working at the jobsite. Mason, in turn, gave the cards to, and discussed them with, the other three employees during working hours. On December 7 and 8, the three employees returned their signed cards to Mason on the jobsite. During working hours on December 8, Mason delivered those cards and his own signed card to Local 631's steward (A. 12; Tr. 129-135).

On December 22, pursuant to earlier requests by Mason, Strunk told Jenkins to teach Mason how to drive the "Euclid" truck (A. 12-13; Tr. 137-138, 191). Strunk left the same day to spend Christmas holidays with Gibbons at Tucson, and did not return to South Point until the evening of December 27 (A. 13; Tr. 60). Mason operated the truck part of December 22 and 23 and all of December 27, the next working day (A. 13; Tr. 139, 191, 192).

In the meantime, Strunk and Gibbons discussed their union problems (A. 13; Tr. 306-307). Upon Strunk's return to the job on the morning of December 28, Jenkins informed him that Mason did "real good" driving the truck, that he was "a little careless, but that was no problem," and that he would "make [Strunk] a good driver" (A. 13; Tr. 191, 192-193). The working day passed without incident. At 10 minutes past quitting time, Strunk remarked to the gathered employees, including Mason, "It is time to go home * * * I will see you fellows in the morning * * *" (Tr. 141).

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[2]The Ash Haulers was found by the Board to be an employer dominated union, *(supra,* p. 2).

At 8:15 that evening, Strunk called Mason's home and told him "not to bother to show up next day", that he would bring his check by his home (A. 15; Tr. 65-66, 141-142). When Mason asked why he was being discharged, Strunk replied that he would "tell [him] in the morning" (Tr. 66). Strunk did not do so (A. 19); and when employee Jenkins asked why Mason had been discharged, Strunk replied: "I'll tell you about it sometime" (A. 16; Tr. 199).

The following day, the two remaining employees then working struck to protest Mason's discharge (A. 15-16; Tr. 197-198). Later that day, Strunk discharged the two strikers, as well as a third employee, Vaughn, who was home on sick leave. Strunk discharged Vaughn, who had known nothing about the strike, after visiting him at his home and interrogating him about his membership in Local 631 (A. 16-17, 18-19; Tr. 82, 85-87, 173-175, 200).

The Company contended at the hearing that its abrupt discharge of Mason was motivated by (1) Mason's carelessness during his three-day promotion to truck driver, (2) his inadequate performance of the clean-up work, (3) the possibility that he might sue the Company for a previously incurred back injury, and (4) his previous "fallouts" with a dentist, a boat shop owner, and a marina proprietor in Bullhead City (A. 37-38; Tr. 57-65).

The Trial Examiner concluded that "[t]he record establishes that all of [the Company's] reasons for discharing Mason were not only without merit but contrary to fact" (A. 37).[3] The Examiner further re-

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[3]See the Examiner's analysis at A.37-38.

jected the Company's assertion that it had no knowledge of Mason's union activities prior to his discharge. The Examiner pointed out that the four employees' union activities had "occurred within the confines of the project and substantially all at the jobsite where Strunk was regularly present. The size of the unit and the work site make it extremely improbable that Strunk would not have been aware of these activities. He knew Local 631's job steward from his prior contact and knew that Mason had been a member of another local of the Teamsters"[4] (A. 36). Accordingly, the Examiner concluded that the Company's alleged reasons for discharging Mason were "pretextual, and that its real reason was his organizing activities on behalf of Local 631" (A. 39).

The Board affirmed the Examiner, adding (A. 2, n.2) that, although owner Gibbons disclaimed any part in hiring or firing prior to the strike, which he contended alerted him for the first time to the union activity (see Tr. 287), the record shows that he talked by telephone with Strunk on December 28, one day before the strike, and arranged a replacement for Mason (Tr. 291, 327; G.C. Exh. 17).

ARGUMENT

The only issue presented by the petition is whether substantial evidence supports the Board's finding, sustained by the court below, that employee Mason was discharged because of his union activities. Such an issue does not

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[4]In late November, Mason had asked Strunk if he should activate his membership in a Teamsters local in Phoenix to which he had belonged before acquiring his South Point job (A. 11; Tr. 56, 126). Strunk said "no" and added that it "would be a good idea" if Mason were to get a withdrawal from the local since the Company did not have a Teamsters contract (*ibid.*).

warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 487-488. In any event, as shown, the record amply supports the Board's findings.

Contrary to petitioner's contention (Pet. 18-20), the propriety of inferring employer knowledge of union activity from the circumstances has been long settled by this Court. "The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew * * * [the discharged employees] had joined * * * [the union] and was displeased or wanted to make an example of them." *National Labor Relations Board* v. *Link-Belt Co.,* 311 U.S. 584, 602. Moreover, the Board did not, as petitioner contends (Pet. 10), "invoke the 'small plant' doctrine * * * [without] in any way discuss[ing] or analyz[ing] the doctrine or articulat[ing] the reasons why it was applicable * * *." The Board's inference of Company knowledge of Mason's union activity took place in a "small plant." The Board relied as well on the circumstances that Strunk admitted being "all over the plant" in regular supervision of the employees, and knew the Teamsters representative who came to deliver the cards (A. 36). Furthermore, the Company's reasons for discharging Mason did not withstand scrutiny, and its anti-union animus was independently established by other unfair labor practices which are not contested here.[5]

[5]See *A.J. Krajewski Mfg. Co.* v. *National Labor Relations Board,* 413 F. 2d 673, 676 (C.A. 1) ("in-plant union activity" in "relatively small" plant, combined with employer vacillation as to reason for discharge, sufficient circumstantial evidence of company knowledge of union activity.

is not based solely on the fact that all the union activity

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1974.

DOJ-1974-05